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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ANTHONY WILLIAMS, Defendant and Appellant.	B207129 (Los Angeles County Super. Ct. No. MA040293)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven D. Ogden, Judge. Modified and, as modified, affirmed with directions.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Anthony Williams appeals from the judgment entered following his plea of no contest to count 1 – first degree residential burglary (Pen. Code, § 459). The court sentenced appellant to prison for four years. We modify the judgment and, as modified, affirm it.

FACTUAL SUMMARY

The record reflects that on October 25, 2007, appellant burglarized the residence of Enic Romero (count 1) in Los Angeles County.

CONTENTIONS

Appellant claims (1) the trial court erroneously imposed restitution on dismissed counts without obtaining a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, and Penal Code section 1192.3, and (2) the Penal Code section 1202.4, subdivision (b) restitution fine imposed by the court must be reduced to $200.

DISCUSSION

1. *The Trial Court's Restitution Order Was Correct.*

a. *Pertinent Facts.*

(1) *The Felony Complaint and Appellant's November 16, 2007 Negotiated No Contest Pleas.*

A felony complaint alleged nine counts against appellant. Counts 1 through 3 involved Romero or his property, and alleged that on October 25, 2007, appellant committed first degree residential burglary, grand theft of personal property (Pen. Code, § 487, subd. (a)), and receiving stolen property (Pen. Code, § 496, subd. (a)), respectively. Counts 4 through 9, alleged Cynthia McConnell as the victim, and that on October 31, 2007, appellant committed first degree residential burglary, two counts of grand theft of personal property, and three counts of grand theft of a firearm (Pen. Code, § 487, subd. (d)(2)), respectively. At all times below mentioned, the same judge presided in the trial court.

On November 16, 2007, the court called the case, the People were represented by Los Angeles Deputy District Attorney Thomas Trainor, and appellant was represented by

Attorney Mario Barrera. The court indicated the parties had negotiated a disposition pursuant to which appellant would enter a plea, be released on his own recognizance, and be sentenced on a future date. The court ordered appellant to return on December 27, 2007, for sentencing. The court offered to take pleas on count 1 (first degree burglary of Romero's residence), count 4 (first degree burglary of McConnell's residence), and count 7 (grand theft of McConnell's firearm), with the understanding the court would sentence appellant to prison for a total of eight years on those counts, unless appellant appeared in court on December 27, 2007, for sentencing, at which time counts 4 and 7, would be dismissed, the court would sentence appellant on count 1 only, and the sentence would be four years in prison. Appellant agreed to this disposition. (The parties below and here refer to this agreement as a "*Cruz* waiver";[1] we will use that term as well.)

Appellant waived his constitutional rights and the court advised him concerning consequences of his plea. Appellant pled no contest to counts 1, 4, and 7, and the court accepted the pleas. The court ordered that a probation report be prepared for the December 27, 2007 sentencing hearing, and released appellant on his own recognizance. The November 16, 2007 minute order reflects as to all counts except counts 1, 4, and 7, "motion to dismiss submitted to time of sentence."

(2) *The December 27, 2007 Sentencing Hearing.*

At the sentencing hearing on December 27, 2007, the People were represented by Los Angeles Deputy District Attorney Meredith Evans, and appellant appeared in court and was represented by Attorney Jason Rubel. After discussion about the counts and sentencing, Evans asked if she could inquire "if the victims have appeared for

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[1] In *People v. Cruz* (1988) 44 Cal.3d 1247, "the Supreme Court noted a trial court could 'impose a sentence in excess of the bargained-for term' as a result of a failure to appear if, at the time the trial court accepts the plea, the defendant *so agrees and expressly waives the right to withdraw the guilty plea*. [Citation.]" (*People v. Rabanales* (2008) 168 Cal.App.4th 494, 504, italics added.) This waiver is a *Cruz* waiver. We assume the plea agreement in this case included a "*Cruz* waiver." In any event, like a *Cruz* waiver, the plea agreement in the present case was clearly designed to secure appellant's attendance at sentencing.

restitution." The court agreed Evans could do so. Rubel then stated, "No appearance by the victims." The court later sentenced appellant to prison for the four-year middle term on count 1. The court dismissed all remaining counts.

Evans told the court that she wanted to "set another restitution date" and did not know why the victims had not appeared in court. The court indicated it would set another date for the restitution hearing. Appellant waived his right to be present at his restitution hearing. The December 27, 2007 minute order reflects that the matter was continued to January 23, 2008, for a restitution hearing. The matter was continued to January 23, 2008, on which date appellant indicated there was an issue as to whether a *Harvey* waiver[2] had been taken. The case was later continued to February 21, 2008.

(3) *The February 21, 2008 Restitution Hearing.*

On February 21, 2008, the court called the case for a restitution hearing, and the People and appellant were represented by Evans and Barrera, respectively. There was no dispute among the parties that the court could order restitution as to count 1. The issue was whether the court could issue restitution based on count 4, which had been dismissed. The People sought restitution as to no counts other than counts 1 and 4.

Evans indicated as follows. Evans had participated in the preplea negotiations but was not in court on November 16, 2007. During the preplea negotiations, appellant originally was going to plead to one count of residential burglary, but later wanted a *Cruz* waiver which was separately negotiated. Appellant ultimately pled as previously indicated. Evans told the court during the February 21, 2008 proceedings that she was sure that she and Barrera had not discussed a *Harvey* waiver.

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[2] In *People v. Harvey, supra,* 25 Cal.3d 754, our Supreme Court stated, "Implicit in . . . a plea bargain, we think, is the understanding (*in the absence of any contrary agreement*) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, [a] dismissed count." (*Id.* at p. 758, italics added.) The "contrary agreement" is a *Harvey* waiver. *Harvey* waiver principles have been applied in a restitution context. (See *People v. Campbell* (1994) 21 Cal.App.4th 825, 830; Pen. Code, § 1192.3; see also, fn. 3, *post.*)

During the course of the February 21, 2008 hearing, Evans made various representations to the court to the effect that Evans and Barrera frequently had practiced before the trial court, and that Barrera knew *Harvey* waivers were implicit in negotiated pleas in circumstances such as those presented in this case. Barrera denied a *Harvey* waiver was contemplated in this case.

The court indicated it would bring appellant back to court, set aside his plea, and proceed. Barrera denied he wanted that and stated that under Penal Code section 1192.3, a *Harvey* waiver was required before restitution could be ordered as to dismissed counts.[3] Evans argued that appellant was "attempting to, through Mr. Barrera, obtain a double benefit, the *Cruz* waiver." The matter was continued to March 20, 2008, for a restitution hearing.

(4) *The March 20, 2008 Restitution Hearing.*

On March 20, 2008, the court called the case for a restitution hearing, and the People and appellant were represented by Evans and Barrera, respectively. Evans suggested a *Harvey* waiver was "implicit," and the court stated, "Well, I don't think it's

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[3] Penal Code section 1192.3, states, "(a) A plea of guilty or nolo contendere to an accusatory pleading charging a public offense, *other than a felony specified in Section* 1192.5 or *1192.7*, which public offense did *not* result in damage for which restitution may be ordered, made on the condition that charges be dismissed for one or more public offenses *arising from the same or related course of conduct* by the defendant which did result in damage for which restitution may be ordered, may specify the payment of restitution by the defendant as a condition of the plea or any probation granted pursuant thereto, so long as the plea is freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court. [¶] (b) If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, *as described in this section*, the court shall obtain a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 from the defendant as to the dismissed count." (Italics added.)

The above italicized portions of Penal Code section 1192.3, suggest that that section, by its terms, may not apply in this case. We note, e.g., that appellant pled no contest to first degree burglary (count 1), a felony specified in Penal Code section 1192.7, subdivision (c)(18). We assume, as the parties do, that Penal Code section 1192.3, applies in this case.

implicit, although plainly at the time of P & S the parties envisioned that the -- we said victims would be testifying -- [¶] . . . [¶] to the issue of restitution."

Over the prosecutor's objections, Barrera later presented documentary evidence consisting of People's "offer sheets," i.e., documents reflecting the People's plea bargain offers in various cases. Barrera offered the documents to show that the People sometimes noted on the offer sheets that *Harvey* waivers would be required as to counts to be dismissed pursuant to plea bargains. The court, reviewing one form, stated, "We do not place every possible condition of a plea on these forms." The court later stated, "Plainly, [the People] do write in from time to time *Harvey* waiver as to all counts."

The court later stated, "Plainly in this case it was envisioned that the victims were going to testify on the issue of restitution. That is what took place at the time of the plea. We continued the matter for that purpose to have their testimony. So plainly that was envisioned by at least Mr. Rubel who was representing [appellant] at the time. [¶] So the court feels that . . . the parties all assumed that was what was going to happen. This was subject to the final approval of the court at the time of the P & S, and had that issue been raised at the time, the court could have exercised its discretion under [Penal Code section] 1192.7 and said, all right, you have your chance to withdraw your plea or stipulate to the *Harvey* waiver. That was not brought up." Over appellant's objection, the court ordered restitution as to counts 1 and 4.

The court ordered that appellant pay restitution to Romero (the victim of count 1) if he demanded it. After the parties stipulated that the amount of restitution pertaining to McConnell (the victim of count 4) was $2,353, the court ordered that appellant pay that amount as restitution to McConnell. We will present additional facts below as appropriate.

b. *Analysis.*

Appellant claims the trial court erroneously imposed restitution on dismissed counts without obtaining a *Harvey* waiver and a waiver pursuant to Penal Code section 1192.3. We disagree.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) Using the paradigm of contract law, "courts should look first to the specific language of the agreement to ascertain the expressed intent of the parties. [Citations.] Beyond that, the courts should seek to carry out the parties' reasonable expectations. [Citations.]" (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120, fn. omitted.) " 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]' " (*People v. Shelton*, *supra*, at p. 767.)[4]

The court ordered restitution as to count 1, concerning which Romero was the victim, and ordered restitution as to count 4, a dismissed count concerning which McConnell was the victim. The court ordered restitution as to no other counts. Accordingly, although some of our analysis below is applicable to other dismissed counts, the only dismissed count we discuss below is count 4.

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[4] Appellant does not claim that a *Harvey* waiver involves a fundamental constitutional right such that appellant's personal waiver was required. There is therefore no dispute that appellant's counsel had the authority to enter a valid *Harvey* waiver on appellant's behalf as part of the plea bargain. "In the criminal context, . . . counsel is captain of the ship. As we said recently: 'When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of "fundamental" personal rights to *counsel's* complete control of defense strategies and tactics.' [Citations.] It is for the defendant to decide such fundamental matters as whether to plead guilty [citation], whether to waive the right to trial by jury [citation], whether to waive the right to counsel [citation], and whether to waive the right to be free from self-incrimination [citation]. As to these rights, the criminal defendant must be admonished and the court must secure an express waiver; as to other fundamental rights of a less personal nature, courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict." (*In re Horton* (1991) 54 Cal.3d 82, 95.)

There is no dispute that appellant did not provide an express *Harvey* waiver as to count 4, during the taking of his pleas on November 16, 2007. The remaining issue is whether a *Harvey* waiver was implied, i.e., whether the reasonable expectation of the parties, in light of the objective manifestation of the parties' intent, was that the court would order restitution based on the facts pertaining to count 4.

Appellant knew during the taking of his November 16, 2007, plea that there were multiple counts, but only two alleged victims who had suffered losses, Romero and McConnell. The losses of Romero and McConnell, suffered within a few days, were substantial. Appellant knew there were restitution issues afoot, and that restitution might be imposed on counts 1 and 4. Appellant's negotiated pleas to counts 1 and 4, exposed him to mandatory restitution (Pen. Code, § 1202.4, subds. (a)(1), (3)(B), (f), (g)) as to count 1, and exposed him to the possibility of mandatory restitution as to count 4, depending upon whether he appeared at sentencing.

Although appellant did not provide an express *Harvey* waiver on November 16, 2007, it is also true that no one on that date raised an issue as to the propriety of a restitution order directing appellant to pay restitution to McConnell. As Evans suggested below, part of the reason may have been the very negotiated pleas and *Cruz* waiver. According to these, if appellant had failed to appear at sentencing, he would have stood convicted on counts 1 and 4, with the result that restitution on those counts would have been mandatory and a *Harvey* waiver would have been unnecessary.

Moreover, the prosecutor suggested that the "*Cruz* waiver" resulting from the addition of count 4, to the negotiated plea to secure appellant's attendance at the sentencing hearing was requested by Barrera for appellant's benefit to delay sentencing (and that appellant was trying to get a "double benefit" by arguing no *Harvey* waiver existed). If the addition of the conviction on count 4, was, as the prosecutor suggested, for appellant's benefit, it should be noted as a matter of fairness that it was this conditional conviction that made the *Harvey* waiver conditionally unnecessary, and complicated matters.

The issue at hand therefore, is what, if anything, did the parties contemplate would happen concerning restitution as to count 4, if appellant appeared at sentencing. In addition to the previously discussed facts, we are entitled to consider the "surrounding circumstances under which the parties negotiated or entered into the contract" (*People v. Shelton*, *supra*, 37 Cal.4th at p. 767). In this regard, we note appellant reasonably could have wanted to pay restitution as to count 4, to resolve the entire case and not expose himself to prosecution on nine counts, many of which would have been strikes in the event he committed a future crime. (Pen. Code, §§ 667, subd. (d)(1), 1192.7, subd. (c)(18) (first degree burglary), (c)(26) (grand theft involving a firearm).)

We are also entitled to consider the "subsequent conduct of the parties" (*People v. Shelton*, *supra*, 37 Cal.4th at p. 767), i.e., the conduct of the parties after the November 16, 2007 plea. In this regard, we note the following.[5] At the December 27, 2007 sentencing hearing, Evans asked if she could inquire "if *the victims* have appeared for restitution." (Italics added.) The victims included McConnell. Appellant was personally present in court and was represented by Rubel. Neither appellant nor Rubel expressed surprise at the prospect that McConnell might have appeared at the sentencing hearing to provide restitution information. Rubel did not object at the sentencing hearing that appellant had not provided a *Harvey* waiver as to count 4. The court, which had taken the plea, agreed Evans could inquire, and the court did not express surprise at Evans's request.

However, Rubel, not Evans, responded, and Rubel, far from strenuously objecting that appellant had not provided a *Harvey* waiver as to count 4, simply replied, "No

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[5] Based on the allegations in the probation report, appellant knew (or should have known if the report were read) that McConnell might appear at sentencing to claim restitution. Indeed, the report referred to the restitution *rights* of McConnell, and indicated that she had been notified of the sentencing hearing pursuant to Penal Code section 1191.1, which gave her a right to appear at sentencing and express her views on her need for *restitution*. Although appellant was entitled to challenge the probation report (*People v. Evans* (1983) 141 Cal.App.3d 1019, 1021), he did not.

appearance by the *victims*." (Italics added.) Evans and Rubel were thus working together to determine if the victims were present to provide restitution information. These facts permit the inference that the reasonable expectation of the parties at the time of appellant's plea was that victims, including McConnell, would appear at the sentencing hearing to present restitution information. Moreover, appellant knew at the time of his plea that if he appeared at the sentencing hearing, the court would be obligated by the plea bargain to dismiss count 4. This permits the inference that the reasonable expectation of the parties at the time of appellant's plea was that McConnell would appear at the sentencing hearing to present restitution information concerning count 4, a count which would be dismissed if appellant appeared at sentencing.

We also note that the parties, during the December 27, 2008 colloquy about whether the victims were present for restitution, did not distinguish between the victims, permitting the inference that Evans and Rubel viewed the victims as similarly situated with the respect to the issue of restitution, i.e., the court properly could order restitution as to both victims. We also note that Rubel took the initiative to represent that the victims were not present at sentencing. This permits the inference that, on the issue of restitution, Rubel was relying on McConnell's absence from the sentencing hearing, not the absence of a *Harvey* waiver as to count 4, as a fact favorable to him on the issue of what, if any, restitution the court would order appellant to pay McConnell.

Later during the December 27, 2007 sentencing hearing, and with both parties knowing the victims had failed to appear, Evans asked the court to set "*another* restitution date." (Italics added.) Rubel did not then protest the implication that the *current* hearing pertained to restitution for the victims as well, and did not then object to a future restitution hearing as to count 4, on the ground appellant had not provided a *Harvey* waiver as to that count. Appellant merely waived his right to be present at the future hearing. No one during the December 27, 2007 proceedings raised an issue as to the propriety of a restitution order directing appellant to pay restitution to Romero and McConnell.

Our analysis is supported by the trial court's ruling. The parties disputed in the trial court whether, historically, *Harvey* waivers generally were implicit in pleas negotiated in the particular trial court below, but the parties' arguments were limited in that the parties did not discuss whether, in this particular case, the parties, at the time of the plea, understood that Romero and McConnell would be present at sentencing to provide information about restitution, or the impact, if any, of that understanding on the issue of whether an express *Harvey* waiver was required. In the context of the parties' limited argument, the trial court appears to have denied that a *Harvey* waiver was "implicit." However, the court then immediately alluded to a fact not discussed by the parties, i.e., at the time of the sentencing hearing, the parties envisioned that the victims would be testifying.

Later, the court stated, "Plainly in this case it was envisioned that the victims were going to testify on the issue of restitution. That is what took place *at the time of the plea*. We continued the matter for that purpose to have their testimony. . . . [¶] So the court feels that . . . the parties all assumed that was what was going to happen." (Italics added.)

Fairly read, the trial court's comments indicate, inter alia, that, at the time of the November 16, 2007 plea, the parties (1) understood that Romero and McConnell would appear at the sentencing hearing to provide information about restitution, and (2) agreed that the matter be continued to December 27, 2007, for sentencing so that the victims could appear. Although Barrera, who had represented appellant at the time of the plea, objected on March 20, 2008, to the imposition of restitution as to count 4, Barrera did not dispute the trial court's March 20, 2008 comments on this issue. Moreover, the court's comments explain why, e.g., appellant expressed no surprise when, on December 27, 2007, Evans asked if she could inquire "if the victims have appeared for restitution," and why she wanted to set "*another* restitution date" (italics added) once she determined the victims were not present. The trial court concluded "the parties all assumed that was what was going to happen" indicating, in the context of its earlier comments, that the parties assumed at the time of the plea that the victims were going to present restitution

information. The trial court, effectively relied on the fact that, at the time of the plea, the parties envisioned that the victims were going to testify on the issue of restitution as a basis to conclude there was an implied *Harvey* waiver as to count 4.

We conclude the reasonable expectation of the parties at the time of appellant's plea was that McConnell would appear at the sentencing hearing to present restitution information concerning count 4, which would be dismissed if appellant appeared at sentencing; therefore, an implied *Harvey* waiver existed as to count 4.

2. *The Restitution Fines Must Be Reduced.*

Appellant claims his Penal Code section 1202.4, subdivision (b), and 1202.45 restitution fines must be reduced. We agree. Neither the People nor the court referred to a Penal Code section 1202.4, subdivision (b) restitution fine before or during the November 16, 2007 taking of the negotiated plea to count 1, or during sentencing, until, during the December 27, 2007 sentencing hearing, the court imposed a Penal Code section 1202.4, subdivision (b) restitution fine in the amount of $800.[6] Appellant was not, during the taking of his plea, advised pursuant to Penal Code section 1192.5, of his right to withdraw a plea. Appellant is entitled to a reduction of the Penal Code section 1202.4, subdivision (b) restitution fine to $200. (*People v. Walker* (1991) 54 Cal.3d 1013, 1018-1019, 1024-1027, fn. 3, 1028-1030.)[7] Since the Penal Code section 1202.4,

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[6] The probation report, prepared for a hearing which was subsequent to appellant's plea, recommended imposition of a Penal Code section 1202.4, subdivision (b) restitution fine, but did not recommend a specified amount.

[7] Neither *People v. Sorenson* (2005) 125 Cal.App.4th 612, *People v. Dickerson* (2004) 122 Cal.App.4th 1374, nor *People v. DeFilippis* (1992) 9 Cal.App.4th 1876, cited by respondent, compels a contrary conclusion. In each of the first two cases, the defendant was advised that a restitution fine between $200 and $10,000 could be imposed, permitting the inference that the parties had agreed to leave determination of the amount of the fine to the discretion of the trial court. In the third case, no punishment whatsoever was a part of the negotiated plea, and appellant was told when pleading that the court would decide his sentence.

subdivision (b), and section 1202.45 restitution fines must be equal (Pen. Code, § 1202.45), we will modify the judgment accordingly.

DISPOSITION

The judgment is modified by reducing to a total of $200, the Penal Code section 1202.4, subdivision (b) restitution fine, and by reducing to a total of $200, the Penal Code section 1202.45 restitution fine and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.